Supreme Court, U. S.
FILED
AUG 22 1977
MICHAEL RODAK, JR., CLERK

No. 76-1747

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

JOHN FLEMING, EXECUTOR OF THE ESTATE OF ROBERT W. BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

William J. Cooney
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1. The question framed by the Government is misleading for it infers the specific information obtained by the IRS was evidence that became part of the public record at the time Robert W. Best entered his guilty plea on September 27, 1973. When the district court accepted the plea on September 27, 1973, the only testimony given in open court related to the general contents of the intercepted

conversations that had occurred during the period of two wiretaps conducted between September 29, 1972 and October 16, 1972, and October 20, 1972 and November 8, 1972. (Pet. App. A, p. 2a; App. A, infra; App. B, infra, p. 5b)

The jeopardy assessment made on May 3, 1973, in the amount of $741,093.49, for the periods beginning in January 1969 through November 1972, was prior to the FBI agent testifying in open court. Furthermore, since the FBI agent's testimony in open court was limited only to the general contents of intercepted conversations during the period of the wiretaps, the assessment for the periods beginning in January 1967 through December 1968, made subsequent to September 27, 1973, was not based upon the testimony given in open court. Accordingly, the second part of the

question framed by the Government which states "wagering taxes . . . were assessed on the basis of such information" (Mem., p. 1) is incorrect.

2. In footnote 1 of its Memorandum, the Government contends that although the revenue agent who was furnished the wiretap information to make the jeopardy assessment is not an "investigative or law enforcement officer" as that term is defined in 18 U.S.C. 2510(7), the disclosure from the FBI to an IRS special agent and in turn by the IRS special agent to the revenue agent was proper because under 18 U.S.C. 2517(2), it was "appropriate to the proper performance of his [IRS special agent] official duties." If such interpretation of the wiretap chapter is embraced, then one must conclude that the disclosure limitation can be easily circumvented by showing a lawful receipt of

such information by an "investigative or law enforcement officer" who can in turn disclose it to anyone for any purpose, as long as the disclosure would be "appropriate to the proper performance of his official duties."

The congressional intent as it related to the right of privacy was to superimpose a limitation upon any disclosure and use by persons who did not fall within the initial "investigative and law enforcement officer" definition. Specifically, 18 U.S.C. 2517(1), which was not cited by the Government, provides that any law enforcement or investigative officer may only disclose such contents "to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." The clear import of

18 U.S.C. 2517(1), which must be read in tandem with the isolated quote of the Government from 18 U.S.C. 2517(2) as well as the other provisions of that section, is that one who has lawful receipt of the contents of a wiretap is limited to its use, unless an appropriate court order is obtained under the provisions of 18 U.S.C. 2517(5) to release such information to non-investigative or law enforcement officers.

3. In footnote 2, the Government contends that the exclusion from evidence of wiretap evidence is limited only if one of the three conditions set forth in 18 U.S.C. 2518(10) has occurred.

The Supreme Court in United State v. Donovan, 97 S.Ct. 658; United States v. Giordano, 416 U.S. 505; and United States v. Chavez, 416 U.S. 562, has used the "substantive" vs. "procedural" nomenclature in determining whether the statutory

exclusion should be imposed pursuant to 18 U.S.C. 2518. However, in Donovan, the Court indicated very precisely that if there was an intentional violation of the wiretap statute, the decisions in these cases would have been different. 97 S.Ct., at 672, n.23; 673, n.26.

In the instant case, there was an intentional violation by the FBI and the IRS special agent in disclosing the wiretap evidence for the purpose of assisting the revenue agent in determining civil tax liability. Since Donovan indicates that wiretap information will not be received in evidence if there is an intentional violation of the wiretap chapter, the clear implication is that, consistent with the intent of Congress, the judicially fashioned exclusionary rule, aimed at deterring violations of constitutional rights, would be imposed under the Court's general

supervisory powers, McNabb v. United States, 318 U.S. 332, 340, for one of the central purposes of the wiretap chapter was to limit the use of information gained from wiretaps, as is clearly reflected in the congressional scheme which concerned itself directly with the right of privacy. Gelbard v. United States, 408 U.S. 41, 48.[1] Accordingly, in the instant case, the intentional violation of the congressional scheme mandates the invocation of both the statutory and judicially fashioned exclusionary rule, for there was no compliance with the provisions of 18 U.S.C. 2517.

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1. Gelbard is significant for it stands for the proposition that notwithstanding whatever general legal principle may apply to a given factual situation, the wiretap statute has preempted these normal legal principles and a different judicial decision may result because of the peculiarities of the wiretap chapter. That is why United States v. Calendra, 414 U.S. 338, is reconciliable with Gelbard.

4. The Government concludes that the amendment of 18 U.S.C. 2517(3), which expanded the disclosure of wiretap evidence to "any proceeding," indicates congressional intent to permit its use in civil tax proceedings.

In 1970, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 was amended by the Organized Crime Control Act of 1970, P.L. 91-452, 84 Stat. 941. The amendment, which is conspicuously placed under Title IX, "Racketeer Influenced and Corrupt Organizations," is directed to preventing the influx of organized crime and its money into legitimate business. [1970] U.S. Code Cong. & Ad. News, 4010. In particular, the legislative history contains an extensive discussion concerning the use of civil proceedings (much akin to that developed in the anti-trust field) to prevent the infiltration of legitimate business by organized crime, which was

intended to be limited to orders of divestment, dissolutions and reorganizations relating to racketeering activities. Nowhere in the legislative history is there any discussion that suggests wiretap information could be used to determine civil tax liability. S.Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969).

5. Finally, the Government's reliance upon United States v. Janis, 428 U.S. 433, is misplaced. In Janis, the Court found no deterrent to the exclusion of evidence by forbidding a different sovereign from using tainted evidence in a civil proceeding "where there was no responsibility or duty to or agreement with the sovereign seeking to use the evidence."

By contrast, the Government in footnote 1 has acknowledged a duty on the part of both the FBI and IRS special agents, under the pertinent provisions of 18 U.S.C.

2517(2), to release information for civil tax purposes to a non-investigative or law enforcement officer who incidentally works for the same sovereign. Accordingly, Janis is inapposite.[2]

The importance and substantiality of the questions presented have not been denied. In light of the inability of the Government to face the issue presented in the petition without grossly distorting the record, the need for plenary review of the action is indisputable.

Respectfully submitted,

WILLIAM J. COONEY
1104 Georgia Bank Building
Augusta, Georgia 30902

STEPHEN E. SILVER
P. O. Box 13528
Phoenix, Arizona 85002

August 1977 COUNSEL FOR PETITIONER

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2. The Janis opinion specifically recognized that the case would have been different if there had been an agreement between federal and local officials. 428 U.S., at 455, n. 31.

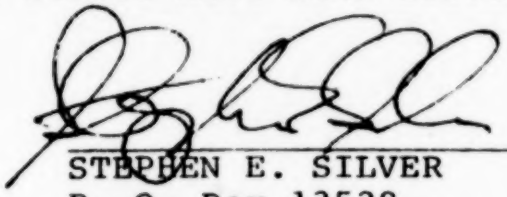
CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 1977, three (3) copies of the Petitioner's Reply Memorandum were mailed, postage prepaid, to:

Wade Hampton McCree, Jr.
The Solicitor General
Department of Justice
Constitution Avenue
Washington, D. C. 20530

Counsel for Respondent

I further certify that all parties required to be served have been served.



STEPHEN E. SILVER
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Phoenix, Arizona 85002

Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

UNITED STATES OF AMERICA,	)	
PLAINTIFF,	)	
versus	)	CR # [5640]
ROBERT W. BEST, ET AL,	)	
DEFENDANTS	)	

Transcript of Agent Edward Collins' statement taken during the change of plea of Mr. Robert W. Best in United States District Court before the Honorable Anthony A. Alaimo in Augusta, Georgia.

APPEARANCES:

FOR THE PLAINTIFF: R. JACKSON B.SMITH, JR.
United States
District Attorney
Department of Justice
Federal Courthouse
Building
Augusta, Georgia
30903

FOR THE DEFENDANT: JOHN C. CALHOUN
Attorney at Law
Southern Finance
Building
Augusta, Georgia

MR. COLLINS: Edward D. Collins, I'm a special agent with the F.B.I.

THE COURT: Would you wait just a moment, Mr. Best? All right, go ahead, Mr. Collins. Mr. Best, I want you to turn around and listen to this, though. All right, Mr. Collins.

MR. COLLINS: May it please the Court, Your Honor, after this Omnibus Crime Bill was passed by Congress, the effective date October 15, 1970, the F.B.I. conducted an investigation on the Augusta lottery; and in this investigation, we developed information that there were five or more persons, and they were bringing in between an average of five thousand - between five and six thousand dollars a day. We established a sort of surveillance on them

from a period of July 10th to November 10th when we searched some of their--twenty-two of their locations and found that they were in continuous operation during this time. Our investigation showed that Mr. Best -- Defendant Best's telephone at his home was being used by one of the telephone operators from prior to -- well, we found out September 29th up to approximately October 5th. We also found that in searching these twenty-two locations on November 10th, we seized twenty-seven adding machines, all but a couple of them were purchased by Mr. Best, and they had been serviced under his name, under an account doing business as "C.C. Cash." Also, because our standard techniques were not working out in this investigation, we requested and obtained authority to intercept some of their phone conversations. And in these conversations, we found that

Defendant Best was more-or-less operating and supervising the whole operation. He was dealing with Defendant Kinard in recruiting personnel; docking their wages when they took off sick; as far as pay; vacation pay; time off. One of the telephone relay operators got a jury summons, and the Controller, Defendant Kinard -- we refer to him as the Controller, Defendant Kinard called him and said he was going to have the man out, and Mr. Best called a local judge to have the man excused from jury. There was many things like this all the way through to indicate that he was heading up this numbers operation.

THE COURT: All right, sir. Any questions you desire to ask Mr. Collins?

MR. CALHOUN: No questions.

THE COURT: Mr. Best, any questions you desire to ask of Mr. Collins? Did you

understand me, sir? Any questions you want to ask him?

MR. BEST: Yes, sir, I want to ask him one question.

THE COURT: All right, sir.

MR. BEST: In all of your surveillance or whatever you call it, did you ever catch me or find out or know of any of your men that I was around and in the operation?

MR. COLLINS: Well, no. When we followed you -- Mr. Best would leave his home and come to the Johnson Building, and Defendant J. B. Palmer was sort of his chauffeur, but we did not actually see him receive the money or do anything that we could connect with the gambling operations. The things we found on him was the fact that the phones that were seized throughout the city and the county were purchased by him and repaired by him

and - through J. B. Palmer and the fact that his one phone at his home was used as a telephone relay by Defendant Kinard for a short period. But as far as seeing him, no, sir.

THE COURT: All right, sir.

END OF AGENT COLLINS' STATEMENT.

CERTIFICATE

I hereby certify that the foregoing four pages of typewritten material were taken down by me, transcribed under my supervision, have been proofread by me, and are true and correct to the best of my ability;

I further certify that I am a disinterested party to this action and am neither kin nor counsel to any of the parties hereto;

This 9th day of August, 1977.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF GEORGIA

AUGUSTA DIVISION

IN THE MATTER OF AN	)	
	)	
APPLICATION FOR AN ORDER	)	CRIMINAL
	)	ACTION
AUTHORIZING USE OF	)	NO. 5640
	)	
INTERCEPTED WIRE COMMUNICATIONS	)	

A P P L I C A T I O N

Comes now R. Jackson B. Smith, Jr., United States Attorney for the Southern District of Georgia, and being duly sworn deposes and says:

This sworn application is submitted for an Order pursuant to Title 18, U.S.C. §2517(5) authorizing the use, pursuant to the provisions of Title 18, U.S.C. §2517(5) in any proceeding held under the authority of the United States or of any state or political subdivision thereof, of the contents and any evidence derived therefrom of

wire communications intercepted by an investigator or law enforcement officer in a manner authorized by Chapter 119, Title 18, United States Code, which relate to offenses other than those specified in the interception orders.

1. He is an "investigative or law enforcement officer--of the United States" within the meaning of Title 18, U.S.C., §2510(7) -- that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Title 18, U.S.C., §2516.

2. Pursuant to the powers conferred on him by Title 18, U.S.C., §2516, the Attorney General of the United States, the Honorable Richard G. Kleindienst, authorized an application for interception orders on two separate occasions.

3. On September 29, 1972, upon application of R. Jackson B. Smith, Jr., United

States Attorney, Southern District of Georgia, an order was issued by the Honorable Anthony A. Alaimo, Judge, United States District Court for the Southern District of Georgia, authorizing agents of the Federal Bureau of Investigation to intercept for a period of 15 days wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 722-2468	Floyd Henderson 1461 Chestnut Street Augusta, Georgia
(404) 736-2609	Furman Devilius Kinard,Jr. 2418 Forest Park Road Augusta, Georgia

And, on October 20, 1972,upon application of R. Jackson B. Smith, Jr., United States Attorney, Southern District of Georgia, an order was issued by the Honorable Alexander A. Lawrence, Chief Judge, United States District Court, Southern District of Georgia, authorizing agents of the Federal Bureau

of Investigation to intercept for a period of 15 days wire communications to and from the below listed telephones:

Telephone Numbers	Subscriber and Location
(404) 733-9578	Bob Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 733-6344	R. W. Best 1331 Monte Sano Avenue Augusta, Georgia
(404) 722-6303	R. W. Best Room 23, 203 8th Street Augusta, Georgia
(404) 722-3998	Bruno Ward Janitorial 842 Greene Street Augusta, Georgia
(404) 798-2944	Frances Marian Seago 2128 Circle Drive (formerly Circular Drive) Augusta, Georgia
(404) 798-0535	Frances Marian Seago 2128 Circle Drive (formerly Circular Drive) Augusta, Georgia
(404) 736-5700	David Chambers 1219 1/2 Reid Road Augusta, Georgia

(404) 736-7188 James A. Bagley
847 Lake Terrace
Drive
Augusta, Georgia

for the purpose of securing evidence that the above-named persons were committing offenses specified in Title 18, U.S.C., §2516, to wit: Offenses involving violations of Title 18, U.S.C., §1955 and §371. A copy of the order along with each application is attached hereto as Exhibit A and incorporated herein by reference.

4. The interception was commenced pursuant to the interception order of September 29, 1972, and terminated on October 16, 1972, in accordance with the provisions of the order.

The interception was commenced pursuant to the interception order of October 20, 1972, and terminated on November 8, 1972, in accordance with the provisions of the order.

5. During the authorized periods of interception, wire communications were intercepted which, when considered together with other evidence subsequently obtained, gave indications that Robert W. Best and others were committing offenses in violation of Title 26 of the Criminal Code of the State of Georgia, Ga. Code Ann. §26-2301.

6. At the time of the application for interception orders, neither the applicant nor agents of the Federal Bureau of Investigation had knowledge of facts sufficient to establish probable cause that the above subjects were violating Title 26 of the Criminal Code of the State of Georgia, Ga. Code Ann. §26-2301.

7. Pursuant to the powers conferred on him by Title 18, U.S.C. §2516, the Attorney General of the United States, the Honorable William B. Saxbe, has authorized this

Walter C. DeLoach
Official Court Reporter
Southern District of Georgia
P. O. Box 552
Augusta, Georgia 30903

application to be made. There is attached hereto as Exhibit B evidence of that authorization.

On the basis of the allegations contained in this application, affiant requests the Court to issue an Order pursuant to Title 18, U.S.C., §2517(5), authorizing the use of the contents of the intercepted wire communications regarding the violation set forth in paragraph 5 above by those persons whose names are set out in paragraph 5 above, in any proceeding held under the authority of the United States of any state or political subdivision thereof, as provided by Title 18, U.S.C. §2517(3).

/s/
R. JACKSON B. SMITH, JR.
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF GEORGIA

SUBSCRIBED and SWORN to before this
14th day of February, 1974

/s/ Elizabeth C. Calhoun
(Notary Public)
My Commission Expires August 9, 1975